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HAROLD B. WILLEY, Cler

No. 285

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

FEDERAL INSURANCE COMPANY, et al.,
Petitioners,

against

ISBRANDTSEN COMPANY, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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Opinions Below

The Opinion of the District Court is unreported and is set forth in the Record at pages 11-14. The per curiam judgment of the Court of Appeals affirming the decree of the District Court appears on page 23 of the Record.

Jurisdiction

The jurisdictional requisites are adequately set forth in the Petition.

Question Presented

The question presented is whether under an Amended Jason Clause in a charter party cargo is obligated to contribute in general average with the carrier for expenses

of a general average nature incurred by reason of carrier's negligent navigation prior to the commencement of the voyage.

The Petitioners' statement on page 5 of its brief of the question presented is incorrect.

Statute Involved

The Petition sets forth on pages 4 and 5 all but one of the pertinent provisions of the United States Carriage of Goods by Sea Act. The section of that Statute relevant to the issues involved in this case omitted in the Petition is Section 4(1) which reads as follows:

> "Neither the carrier nor the ship shall be liable for loss * * * resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy * * *" (Title 46 U. S. C. Section 1304(1).)

Statement

The facts relevant to the issues of law are adequately set forth in the Petition commencing on page 2 through the first two paragraphs on page 4. We therefore proceed immediately to a discussion of the question of whether this court should grant a writ of certiorari to review the decision of the court below.

Argument

This case does not involve in any way the question of whether the Carriage of Goods by Sea Act (hereafter called the "Sea Act") impairs a carrier's obligation to use due diligence to provide a seaworthy ship. The only question is whether respondent is liable under Section 4(2)(a) of the Sea Act for the negligent navigation of the Master that resulted in the vessel's stranding off Honolulu.

Respondent's right to recover general average contribution from cargo is founded upon the terms of the Amended Jason Clause contained in the voyage charter made between Respondent and Petitioners' assured. The material portions of this Clause are:

> "In the event of accident * * * damage * * * before or after commencement of the voyage resulting from any *cause* whatsoever whether due to negligence or not for which or for the consequences of which the ship owner is not responsible * * * the * * * owners of the cargo shall contribute with the ship owner in general average * * *". (emphasis supplied)

By this Clause cargo has agreed to equate its obligation to contribute in general average with Respondent's responsibility for the accident giving rise to the general average claim. It is agreed that the expenses for which Respondent seeks contribution are of a general average nature. It is agreed that the *cause* of the damage or accident was negligent navigation on the part of the Master. If respondent is liable or responsible for the accident caused by the negligent navigation, cargo is not obligated to contribute in general average. If respondent is not liable or responsible for the accident caused by the negligent navigation, cargo is obligated to contribute in general average. The only question on the merits therefore is whether Respondent is "responsible" for the negligent navigation of the Master.

It is respectfully submitted for the reasons set out below that (1) there is no doubt whatsoever of the correctness of the decisions of the courts below on the merits; (2) there is no conflict between this decision and the decisions of any other court, either direct or in principle; and (3) there is no important question of federal law involved.

I

The Decision Below is Clearly Correct

The Petitioners' contention has already been fully explored and considered twice. First, by the District Court for the Southern District of New York (Judge John W. Clancy) and second, in the Court of Appeals (Judges Thomas W. Swan, Learned Hand and Augustus N. Hand).

The substance of the decision below is that under the Amended Jason Clause cargo is obligated to contribute in

general average if the carrier is not liable for the cause of the accident, and here the carrier was relieved of liability for the cause of the accident (negligent navigation) by Section 4(2)(a) of the Sea Act although the negligent navigation took place prior to the commencement of the voyage. The conclusion that the exception for negligent navigation in 4(2)(a) of the Sea Act applies before a voyage is commenced results from the fact that, unlike similar exceptions in the Harter Act, the availability of Sea Act exceptions is not conditioned on a showing of the seaworthiness of the vessel at the commencement of the voyage. Consequently under the Sea Act the exceptions are not limited to the period following the commencement of the voyage. This follows from the plain terms of the Sea Act.

It is very important to note that the lower court's decision rests on the terms of the contract beween the parties, the Amended Jason Clause, as well as the construction of Section 4(2)(a) of the Sea Act. The last full paragraph on page 9 of the Petition fails to mention the terms of the contract as one of the two basic elements in the decision.

II

There is no Conflict of Decision

There is no decision of the Second or any other Circuit involving the same or a similar set of facts. Consequently, the holding of this case does not in any way conflict with the holding of any other case. The "conflict" is said to be in principle. (Petition pp. 11-12)

The principle said to be involved is that which imposes on the shipowner a duty to use due diligence to make his vessel seaworthy. Five cases from the Second, Sixth and Ninth Circuits are cited in support of this principle. All of these cases involve the question of the liability of a carrier for damage to cargo and hold quite clearly that where cargo is damaged by reason of a carrier's failure to discharge its duty to provide a seaworthy vessel, cargo may recover. With this holding we, of course, fully agree. But the principle or rule laid down in those cases is not involved in the instant case.

This case involves the question of liability of cargo to contribute in general average *under an Amended Jason Clause*. As we have seen, under this clause the liability of cargo to contribute is made coincident with carrier's non-liability for the accident. Here the carrier's responsibility for the accident depends upon the terms of the Sea Act. Under the express terms of the Sea Act the Carrier is not liable for the consequences of negligent navigation. And it is agreed the cause of the accident was negligent navigation. The question of seaworthiness is not involved. In any event, even if it were, the Sea Act imposes responsibility on a carrier for unseaworthiness only in the event that the unseaworthiness *caused* the accident or loss. Here it is agreed that the accident was not caused by unseaworthiness but by negligence. This is the extent to which the carrier's duty to provide a seaworthy vessel is involved in this case.

Clearly the holding that cargo must abide by its agreement and contribute when the carrier is not under any liability under the Sea Act by reason of unseaworthiness or otherwise, does no violence to any principle imposing liability on the carrier to cargo by reason of unseaworthiness or other causes. In short this case in no way reduces or restricts the liability of a carrier for damage to cargo. It holds only that where cargo has unqualifiedly agreed to equate its obligation to contribute in general average with the carrier's non-liability for particular average, cargo should not later be able to complain that it made a bad bargain.

On page 10 of the Petition there is the suggestion that the decision conflicts with another principle or rule of law that the exception for negligent management or navigation only applies after the voyage has commenced. All but one of the cases cited by Petitioners in support of this proposition were decided under the Harter Act, which, for the reasons set out in the decision of the District Court, has no bearing on the scope of the exceptions in the Sea Act. *The Willowpool* 12F. Supp. 96 (S. D. N. Y.); affirmed without opinion 86F. (2d) 1002 (C. A. 2)—the one case arising

under the Sea Act—holds only that where cargo damage is caused by the unseaworthiness resulting from negligent management prior to the commencement of the voyage the carrier cannot rely on the exception for negligent management. This result is clearly correct under Section 4(1) of the Sea Act because the loss was caused by unseaworthiness. There is no conflict with our case because here the accident was caused by negligent navigation, not unseaworthiness.

III

There is no Important Question of Federal Law

Much of what has been said above under II applies here. The only Federal question concerns the scope of Section 4(2)(a) of the Sea Act. The lower court's construction of the Statute is in accordance with its plain meaning. Once it is decided that the Sea Act relieves a carrier of liability for negligent navigation prior to the commencement of the voyage all that remains is to give effect to the express terms of the Amended Jason Clause.

What has just been said covers "Reasons" 1, 2 and 3 advanced on pages 11 and 12 of the Petition.

The answer to "Reason" 4 on page 12 would appear to be that the Master, with respect to matters of navigation, is as far beyond the control of the carrier's managing officers after he leaves the dock as he is in the middle of the ocean.

Finally, with respect to "Reason" 5 it is difficult to understand in just what manner the level of insurance premiums should govern the construction of the Carriage of Goods by Sea Act and an Amended Jason Clause.

Conclusion

For the foregoing reasons it is respectfully submitted that this Petition for a writ of certiorari should be denied.

Respecfully submitted,

JAMES S. HEMINGWAY